

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCIAL TRUJILLO,

Defendant-Appellant.

UNPUBLISHED

June 18, 2013

No. 310063

Kent Circuit Court

LC No. 11-002271-FH

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

FITZGERALD, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that the police had a reasonable suspicion to approach and seize the truck and defendant. Because I believe that the initial approach and seizure was unwarranted, I would conclude that all incriminating evidence flowing there from should have been suppressed.

As the majority notes, the underlying principles governing investigative stops are relevant here. *Terry v Ohio*, 392 US 1; 88 s Ct 1868; 20 L Ed 2d 889 (1968), permits brief investigation detentions on less than probable cause. In order to justify an investigative stop, the police must have a particularized suspicion, based on objective observations, that the person stopped has been, is, or is about to engage in some type of criminal activity. *People v Coscarelli*, 196 Mich App 724, 727; 493 NW2d 525 (1992). An investigatory stop is commonly said to be permissible where an officer has observed unusual conduct which leads the officer to reasonably conclude in light of his experience that criminal activity may be afoot. *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). Reasonable suspicion must be based on something more than "an inchoate or unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 99; 459 NW2d 849 (1996). Authority and limitations associated with investigative stops apply to vehicles as well as people. *Nelson*, 443 Mich at 632.

Whether the police have a reasonable suspicion to make an investigatory stop is determined case by case, on the basis of an analysis of the totality of the circumstances. *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). In *People v Freeman*, 413 Mich 492, 496; 320 NW2d 878 (1992), two patrolling police officers observed "a lone automobile parked, with its parking lights on and its motor apparently running, near a darkened house in a private parking lot adjoining" a race track at 12:30 a.m. *Id.* at 493, 495. The police officers approached the

defendant's vehicle and detained him, and the seizure led to discovery of a pistol in the defendant's automobile. *Id.* at 493. In overturning the trial court's denial of the defendant's motion to suppress, this Court noted that the police only stated that the "automobile aroused their suspicions without explaining what criminal activity they suspected or how their factual observations supported these suspicions." *Id.* at 496. This Court held that the presence of an automobile in a parking lot, without more, does not support a reasonable suspicion of criminal activity. This Court noted, however, that the presence of an automobile may, in combination with other specific objective facts, support a reasonable suspicion warranting brief seizure of the vehicle's occupant for limited on-the-scene inquiry. Because the record in that case was devoid of any reference to other specific facts that would cast a suspicious light upon the presence of the defendant's vehicle in the parking lot, this Court held that the initial stop was unwarranted and that all incriminating evidence flowing therefore should have been suppressed. *Id.* at 497.¹

In the present case, defendant was observed sitting in his parked vehicle in the public parking lot at Grandville Marketplace at approximately 3:00 in the afternoon. According to Officer Garza, defendant was still in his vehicle approximately fifteen minutes later. At that time, Officer Garza observed defendant take a drink from a "blue can." Officer Garza admitted that he did not know what type of beverage was in the container based simply on its appearance. He asserted that, in light of his knowledge that individuals commonly parked in the marketplace parking lot and consumed alcohol, he believed that defendant was drinking alcohol in his vehicle in violation of a city ordinance that prohibited open containers of alcohol in a vehicle. In my view, the totality of the circumstances – that is, defendant sitting in his vehicle for fifteen minutes in the public parking lot of a marketplace at 3:00 in the afternoon and taking a drink from a "blue can" – do not establish that Garza possessed a reasonable suspicion of possible criminal activity at the time he approached and seized defendant and his truck. Accordingly, I would conclude that the trial court erred by denying defendant's motion to suppress.

/s/ E. Thomas Fitzgerald

¹ Officer Garza testified that he had reasonable suspicion that the criminal activity that defendant had been or was engaging in was criminal trespass and having an open container of alcohol in a motor vehicle. Interestingly, at trial the prosecutor conceded that the record did not support a conviction for criminal trespass, and the trial court acquitted defendant of having an open container of alcohol in a motor vehicle. Thus, defendant's only conviction was for possession of the cocaine that was discovered after the investigatory approach and seizure.